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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961
No. 361

DARRYL THOMAS KEMP,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION.

STANLEY MOSK,
Attorney General,
WILLIAM E. JAMES,
Assistant Attorney General,
PHILIP C. GRIFFIN,
Deputy Attorney General,
600 State Building,
Los Angeles 12, California,
Attorneys for Respondent.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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Opinion Below.

The opinion of the Supreme Court of California is reported as *People v. Kemp*, 55 A. C. 459, 11 Cal. 361, 359 P. 2d 913. A Petition for Rehearing was filed March 17, 1961, and denied March 29, 1961 (see Minutes, Supreme Court of California, 55 A. C.).

Three separate Petitions for Writs of Habeas Corpus, or, in the alternative, for Error Coram Nobis were filed by Petitioner. They were denied by the Supreme Court on May 10, 1961, June 6, 1961 and August 9, 1961.

Jurisdiction.

Jurisdiction of this Court is invoked under 28 U. S. C., Section 2101(d), and Rule 22(1) of this Court.

Questions Presented.

Petitioner contends that three questions are presented in his application as follows:

1. Rights guaranteed under the Fourteenth Amendment were denied when he was tried on an indictment charging Murder in 1957, and two counts of Rape in 1959 when the common elements of intent, persons involved, time and place were lacking.

2. The evidence was insufficient to establish murder because he was not competent to form an intent and the Supreme Court erred in holding the evidence to be sufficient and in denying a rehearing and Writ of Habeas Corpus or Coram Nobis.

3. Denial of Rights under the Fourth and Fifth Amendments in the taking of blood and saliva samples from him for use as evidence at the trial.

Neither the record nor the law sustains petitioner in these contentions and an examination of the record will reveal that this petitioner was accorded the fair trial guaranteed him by the Federal and State Constitutions.

Statement of the Case.

In an indictment returned by the Grand Jury of the County of Los Angeles on July 27, 1959 petitioner was charged in Count One with the crime of murder in violation of Section 187 of the Penal Code, a felony, and it was alleged that on or about June 10, 1957 he did wilfully, unlawfully, feloniously and with malice aforethought murder Marjorie Lucille Hipperson.

In Count Two of that indictment petitioner was charged with the crime of forcible rape in violation of

Section 261(3) of the Penal Code, a felony, and it was alleged that on or about July 15, 1959 he did wilfully, unlawfully, feloniously and with force and violence have and accomplish an act of sexual intercourse with and upon E. Helen Shelton, a female person not then and there his wife, without her consent and against her will, overcoming her resistance by force and violence.

In Count Three of that indictment petitioner was charged with the crime of kidnapping in violation of Section 207 of the Penal Code, a felony, and it was alleged that on or about July 15, 1959 he did wilfully, unlawfully, feloniously and forcibly steal, take and arrest E. Helen Shelton and did carry her to another part of Los Angeles County.

In Count Four of that indictment petitioner was charged with the crime of forcible rape in violation of Section 261(3) of the Penal Code, a felony, and it was alleged that on or about May 12, 1959 he did wilfully, unlawfully, feloniously and with force and violence have and accomplish an act of sexual intercourse with and upon Lelah D. Sherman, a female person not then and there his wife, without her consent and against her will, overcoming her resistance by force and violence.

In Count Five of that indictment petitioner was charged with the crime of rape in violation of Section 261(4) of the Penal Code, a felony, and it was alleged that on or about May 12, 1959 he did wilfully, unlawfully and feloniously have and accomplish an act of sexual intercourse with and upon Lelah D. Sherman, a female person not then and there his wife, without her consent and against her will, preventing her resistance

by threats of great and immediate bodily harm accompanied by apparent power of execution. [Clk. Tr. pp. 1-5.]

Petitioner was duly arraigned and pleaded "Not Guilty" and "Not Guilty by reason of insanity." The court appointed Drs. K. Grosvenor Bailey and Dayrel D. Smith, under Section 1027 of the Penal Code to examine him and report to the court as to his sanity. [Clk. Tr. p. 9.]

Drs. Bailey and Smith reported petitioner legally sane at the time of examination and the time of the commission of the crime, but a sex psychopath. [Clk. Tr. pp. 47-48.] Dr. Thomas L. Gore was appointed under Section 1871 of the Code of Civil Procedure to examine petitioner and report on his mental status and his ability to cooperate with counsel. [Clk. Tr. p. 23.] Dr. Gore found him to be sane at the time of the crime and capable of cooperating with counsel. [Clk. Tr. p. 32.] Dr. James Solomon, at the request of counsel for petitioner, made an examination of him and reported that he was insane. [Clk. Tr. pp. 33-35.]

On December 31, 1959 after a trial by jury, petitioner was found guilty as charged in the indictment as to Counts One, Two, Three and Five with the finding as to the charge in Count One of murder in the first degree. As to Count Four he was found not guilty. [Clk. Tr. p. 57.]

On January 21, 1960, after a trial by jury, petitioner was found sane at the time of the commission

of each of the offenses of which he stood convicted. [Clk. Tr. p. 154.]

On January 23, 1900, after a trial by jury, that jury fixed the penalty for the commission of murder as charged in Count One of the indictment as death. [Clk. Tr. p. 180.]

Petitioner moved for a new trial and the motion was denied. Petitioner's motions to reduce the degree from murder in the first degree to murder in the second degree and to reduce the penalty from death to life imprisonment and to declare a doubt as to present sanity of petitioner were denied with the right reserved to counsel to present additional evidence. The court appointed Drs. Edwin E. McNiel and K. H. Tutunjian under Section 1027 of the Penal Code to examine petitioner as to his present sanity at the request of counsel for the defense. [Clk. Tr. p. 187.] Drs. Tutunjian and McNiel reported him to be sane. [Clk. Tr. pp. 190, 193.] The court declined to declare a doubt as to petitioner's present sanity. [Clk. Tr. pp. 194-195.]

As to Count One of the indictment petitioner was sentenced to death. [Clk. Tr. p. 194.] As to Counts Two, Three and Five he was sentenced to the State Prison for the term prescribed by law, the sentences to run consecutively. [Clk. Tr. p. 195.]

The appeal was automatic from the sentence of death. (Pen. Code Sec. 1239.)

Statement of the Facts.

The facts are sufficiently set forth in the opinion of the California Supreme Court, however, as Petitioner has raised the question of his sanity at the time of the offense the facts concerning the defense of insanity are herein presented.

Dr. Marcus Crahan.

Dr. Marcus Crahan, psychiatrist of the County of Los Angeles and on the panel of the Superior Court, interviewed petitioner on July 20, 1959 because he had refused to eat in the County Jail. Petitioner was mute at that time except for having told the doctor that he had a headache. [Rep. Tr. pp. 1665-1666.]

He saw him again on July 22nd by order of the Superior Court, Department 95, on a civil sanity hearing. The interview on that occasion consisted of observing him, taking his history, his family history, his general background, his orientation and looking for any evidences of mental abnormality, intellectual abnormality or abnormality of character, personality or mind. He also gave him a brief physical examination. [Rep. Tr. p. 1668.]

Dr. Crahan received information concerning the behavior of petitioner on June 10, 1957 and July 15, 1959 from Sergeant Close of the Hollywood Detective Bureau. [Rep. Tr. pp. 1669-1670.] Dr. Crahan's final interview with petitioner was on December 10, 1959, at the request of the District Attorney. [Rep. Tr. p. 1670.] The hospital records of the County Jail reflect that he had normal blood pressure, normal temperature, etc.

On each of these three occasions Dr. Crahan had an oral interview with petitioner. From these oral interviews Dr. Crahan was able to reach an opinion as to his state of mind at the time examined and in relationship to former events, and felt there was no evidence that there was anything different in his former state of mind than there was at the time of his examination. He found nothing in his examination to indicate an abnormal mental condition as of June 10, 1957. [Rep. Tr. pp. 1071-1072.] It was the doctor's opinion that petitioner was legally sane on June 10, 1957. Taking into consideration the facts and circumstances of the rape and murder of Marjorie Hipperson by petitioner, Dr. Crahan was of the opinion that he fully appreciated the nature and consequences and the quality of his act; that he did know that the act was wrongful and violated the rights of another, and that he was fully capable at that time to know the difference between right and wrong. [Rep. Tr. pp. 1075, 1076.]

Taking into consideration the interviews and examinations of petitioner, and the facts and circumstances of the rape of Lelah Sherman on May 12, 1959, the doctor stated that according to the behavior described he would say it was the behavior of a normal individual with no psychosis and that he was legally sane at that time and responsible for his acts and knew the difference between right and wrong. [Rep. Tr. pp. 1682-1683.]

Taking into consideration the examination of petitioner, and the facts and circumstances of the kidnaping and rape of Ethel Shelton on July 15, 1959, the doctor was of the opinion that he was capable at that time to understand and appreciate the character and

quality of his acts; that he realized that the act he committed was a violation of Mrs. Shelton's rights and that he was capable of knowing the difference between right and wrong at that time.

During petitioner's interviews, he did not appear to have any memory problem. He was completely well oriented. He was rational, logical, responded to questions with an alertness, showed no signs of depression or undue relation or any mental abnormality. He was suffering from no delusions. He was not in a state of hallucination. He did not have any psychotic aberrations. He did not appear to be a schizophrenic. He did not appear to be an epileptic. There was no evidence of petitioner having been in a fugue state. There were no neurological abnormalities nor a diseased mind as to each of these offenses. [Rep. Tr. pp. 1677-1679, 1683-1684, 1688-1690.]

Petitioner's apparent lack of memory was based on what he said, not on medical facts. The doctor was of the opinion that after petitioner was informed the police were interested in a murder charge and he became less cooperative, it was because he was aware of the difference between right and wrong in relationship to those acts and changed his attitude in self defense. [Rep. Tr. pp. 1690-1691.]

Dr. Thomas L. Gore.

Dr. Thomas L. Gore, psychiatrist, examined petitioner orally on October 21st and 22nd of 1959. At that time he gave him a cursory physical examination and an extensive neurological observation of his eyes and face. [Rep. Tr. pp. 1746-1748.] Having in mind the previous hypothetical questions propounded to him

concerning the activities of petitioner on June 10, 1957, May 12, 1959, and July 15, 1959, Dr. Gore was of the opinion that on June 10, 1957, petitioner was fully capable of knowing what he was doing and knew whether it was right or wrong. He understood the nature and consequences of his act. He recognized that it was a violation of the rights of another. [Rep. Tr. p. 1748.]

As to May 12, 1959, petitioner was capable of knowing the difference between right and wrong at the time he committed the act of rape upon Lelah Sherman. He knew the nature and consequences of his act. He knew it was a violation of her rights.

As to July 15, 1959, petitioner was fully capable of knowing the difference between right and wrong when he committed the act upon Mrs. Shelton. He recognized the nature and consequences of his act. He understood and knew that it was a violation of the rights of another. [Rep. Tr. p. 1748-A.] At that time he was suffering from no mental derangement at all. He had no mental disease. He was not suffering from any delusions on any of these three occasions. He had no hallucinations at any of these three occasions. [Rep. Tr. p. 1749.] Petitioner has never suffered from schizophrenia, nor has he ever had an hysterical fugue state. [Rep. Tr. p. 1750.]

Dr. K. Grosvenor Bailey.

Dr. K. Grosvenor Bailey, specialist in nervous and mental diseases, with background in neurosurgery and psychiatry, was appointed to examine and did examine petitioner on August 20, 1959 and August 28, 1959. [Rep. Tr. pp. 1775-1777, 1785.] At that time the

doctor gave petitioner a neurological examination. He gave him a test to determine his subconscious attitude and capacity, a Rorschach test and other subjective tests. He was able to form an opinion as to petitioner's sanity on June 10, 1957, May 12, 1959, and July 15, 1959. [Rep. Tr. pp. 1778-1779.] As part of the examination, the doctor inquired of those who were around petitioner in jail. It appeared, according to the hospital records, that when the deputies were around he was relatively noncommittal but when other men were around apparently he talked relatively freely. [Rep. Tr. p. 1788.] The doctor found nothing abnormal as a result of his neurological examination. [Rep. Tr. p. 1789.]

Taking into consideration his examination of petitioner and the facts concerning his murder and rape of Marjorie Hipperson on June 10, 1957, he was of the opinion that petitioner was legally sane and a sexual psychopath at that time. He knew the difference between right and wrong. He knew the nature and consequences of this act of rape and murder. He knew that he was violating the rights of another. [Rep. Tr. pp. 1805-1807.] There was no derangement of his mind nor did he have a diseased mind that would make him incapable of knowing the difference between right and wrong.

As to the offense on May 12, 1959 concerning Lelah Sherman, the doctor was of the opinion that petitioner was legally sane and capable of knowing the difference between right and wrong at the time, capable of understanding the nature and consequences of his act and capable of knowing that he was violating her rights at that time. [Rep. Tr. p. 1810.] He did not have a diseased

or deranged mind nor was he suffering from hallucinations or delusions.

As to petitioner's kidnaping and rape of Ethel Shelton, the doctor was of the opinion that he was capable of appreciating and knowing the difference between right and wrong at that time, of appreciating the consequences of his act, of knowing what he was doing was wrong and a violation of the rights of another. He had no mental disease or derangement, no hallucinations, or delusions. [Rep. Tr. pp. 1816-1817.]

Dr. Dayrel D. Smith.

Dr. Dayrel D. Smith, psychiatrist at Metropolitan State Hospital, Norwalk, California, examined petitioner at the request of the court on August 11, 16, 18, and 21, 1959. [Rep. Tr. pp. 1849-1852.] When Dr. Smith introduced himself as a psychiatrist appointed by the court to inquire into appellant's mental condition, petitioner said that he was sorry he wouldn't say anything; that he wouldn't write anything and that he hadn't killed anybody. [Rep. Tr. p. 1852.]

At the second interview, petitioner recognized Dr. Smith but declined to speak, stating that he was instructed not to. The doctor confined his examination to observing petitioner's behavior as he did such things as smoking, identifying himself to an officer and producing his property slips on demand. The doctor was unable to determine any break with reality. [Rep. Tr. pp. 1854-1855.] Concerning the events of June 10, 1957, May 12, 1959, and July 15, 1959, as to petitioner's conduct with the victims, Dr. Smith was of the opinion that he was legally sane on these occasions, able to appreciate right from wrong, knowing the na-

ture and consequences of his act; and knowing that the act was in and of itself wrong and a violation of the rights of another. [Rep. Tr. pp. 1860-1861.] Dr. Smith found no evidence of any mental derangement or disease that would prevent petitioner from being capable of knowing right from wrong at the mentioned time. [Rep. Tr. p. 1861.] The doctor found no evidence of hallucinations or delusions. [Rep. Tr. pp. 1862-1863.]

Defense.

Dr. James Solomon.

Considering the fact of the May 12, 1959 rape of Lelah Sherman, and his examination of petitioner, Dr. James Solomon, psychiatrist, was of the opinion that he was legally insane at the time of the offense. He did not have sufficient mental capacity to appreciate the character and quality of the act. He did not understand that it was a violation of law. [Rep. Tr. pp. 1887-1888.] He did not understand that it was a violation of the rights of another. He was not able to comprehend the probable consequences. [Rep. Tr. p. 1889.]

Considering the facts concerning the rape by petitioner of Ethel Helen Shelton on July 15, 1959, the doctor was of the opinion that he was legally insane at that time. He could not appreciate the character and quality of his act. He could not understand that it was a violation of the rights of another. He was not able to appreciate the character and probable consequences of his act.

Concerning the murder by petitioner of Marjorie Hipperson on June 10, 1957, the doctor was of the

opinion that he was legally insane at the time. He was not able to appreciate the character and quality of the act. He was not able to understand that it was a violation of the rights of another. He was not able to appreciate the character and to comprehend the probable consequences of his act. [Rep. Tr. pp. 1892-1893.]

Dr. Solomon's reason was that petitioner was in a state of mental unconsciousness on these three occasions. He was in a fugue state. He was acting as a robot. He was not in control of himself as any conscious person would be.

Dr. Solomon interviewed petitioner in a wakeful state and under sodium pentothal a number of times. He also performed psychological testing. He made a complete physical and neurological study and there was no support for any contention of physical disease of the brain nor did he find any evidence of malingering. [Rep. Tr. pp. 1894-1895.]

Dr. Solomon was with petitioner approximately 35 to 40 hours.

Dr. Solomon determined that petitioner had a number of delusions at the time of the examination. [Rep. Tr. p. 1896.] He was suffering from the delusion that the government was being run by the Mafia. [Rep. Tr. p. 1898.]

Dr. George N. Thompson.

With the facts constituting the violation and death of Marjorie Hipperson on June 10, 1957 in mind, Dr. Thompson was not able to give an opinion whether petitioner was sane or insane when he committed those acts. He stated that he thought petitioner's judgment

was distorted but was unable to state completely whether he was able to appreciate the character and quality of the acts. [Rep. Tr. p. 1977.] He was not able to form an opinion as to whether or not he knew and understood that it was a violation of the rights of another and, in itself, wrong. He formed the opinion that petitioner's judgment was sufficiently distorted so that he could not completely comprehend the probable or possible consequences of his act. [Rep. Tr. p. 1978.]

As to the May 12, 1959 violation of Lelah Sherman, Dr. Thompson was of the opinion that petitioner probably was not completely able to appreciate the character and quality of his act, that probably he did not completely understand that it was a violation of the rights of another and, in itself, wrong and that he probably could not comprehend the probable or possible consequences of his act. [Rep. Tr. pp. 1979-1981.]

As to the violation of Mrs. Shelton on July 15, 1959 Dr. Thompson was of the opinion that petitioner probably could not appreciate the character and quality of those acts, that he could not understand that it was a violation of the rights of another to participate in that type of activity and that it was wrong and that he probably could not appreciate the character or comprehend the probable and possible consequences of his act. [Rep. Tr. pp. 1981-1982.]

ARGUMENT.

I.

The Several Offenses Were Properly Joined in the Indictment and Properly Tried in One Proceeding. Therefore No Substantial Federal Question Is Presented.

It is first contended that petitioner was denied a fair trial in being tried on unrelated offenses arguing that the murder count of Hipperson was influenced by the acts offered in evidence in support of recent rape and kidnaping counts. We submit that the murder count and the subsequent counts of rape and kidnaping were properly joined in the indictment and that it was in the interest of justice that these counts be tried in a single proceeding.

The opinion of the California Supreme Court has exhaustively treated the contention of petitioner that he was denied a fair trial by the joinder of the several offenses. (*People v. Kemp*, 55 A. C. 459, 474-478.) The opinion completely disposes of the question and demonstrates the absence of any substantial federal question regarding the point for the joinder was proper under state law and no federal question would be raised unless the state procedure itself of necessity denied petitioner due process of law. We submit that the joinder of offenses on a reasonable basis is in accordance with established law of criminal procedure and that joinder of crimes of the same or similar class is reasonable.

Under the Federal Rules of Criminal Procedure where offenses charged in several counts are of the same character joinder is permissible and failure to object to the joinder before trial constitutes a waiver.

Smith v. United States, 180 F. 2d 775 (D. C. Cir.);

United States v. Morabette, 119 F. 2d 986, 988-989 (7th Cir.);

Nestlerode v. United States, 122 F. 2d 56, 58 (D. C. Cir.);

Finnegan v. United States, 204 F. 2d 105, 109-110 (8th Cir.).

Rule 8(a) of the Federal Rules of Criminal Procedure provides as follows:

> "(a) Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, *are of the same or similar character* or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan." (Emphasis added.)

Rule 12(b) (2) of the Federal Rules of Criminal Procedure provides as follows:

> (2) Defenses and Objections Which Must Be Raised. Defenses and objections based on defects in the institution of the prosecution *or in the indictment or information* other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses

and objections then available to the defendant. *Failure to present any such defense or objection as herein provided constitutes a waiver thereof,* but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding." (Emphasis added.)

We respectfully submit that there was no error in the joint trial of these offenses; that in any event no prejudice was suffered by appellant and that no substantial federal question has been raised.

II.

There Was Sufficient Substantial Evidence to Support the Judgment of Conviction of Murder in the First Degree and the Denial of the Writs of Habeas Corpus Presents No Substantial Federal Question.

Next it is contended by petitioner that the evidence is insufficient to sustain the judgment of conviction of first-degree murder, emphasizing defense psychiatric testimony. In effect, petitioner is asking this Honorable Court to reweigh the evidence. Respondent submits that there is sufficient substantial evidence to support the determination of the jury and that this determination is final with the State Supreme Court's decision.

The evidence was extensively reviewed by the California Supreme Court and found to be entirely sufficient to support the conviction of the first degree murder giving full consideration to the fact that peti-

tioner had been found mentally ill by a psychiatrist but that the jury did not agree with him. The opinion disposes of any contention that a federal question is presented by the determination of the jury as to either the commission of the crimes and petitioner's sanity at the time. (*People v. Kemp*, 55 A. C. 459, 470-473.)

Four eminently qualified psychiatrists testified that petitioner was sane at the time he committed the rape-murder and able to know right from wrong, realize the nature and quality of his acts and form the specific intent to rape Marjorie Hipperson and that he was not unconscious. The jury chose to rely upon these expert opinions and reject the opinion of the defense psychiatrist. Since this testimony reasonably supports the determination of the jury this Honorable Court cannot reweigh this expert testimony and reject the finding of the jury as suggested by petitioner.

We respectfully submit that the verdict of guilty of murder in the first degree is supported by sufficient substantial evidence was properly affirmed.

Petitioner contends that, in light of new evidence tending to indicate that he might have been insane to the extent that he could not tell right from wrong at the time of the offenses of which he stands convicted, the Supreme Court of California fell into error in failing to secure for petitioner a new trial on the issue of insanity and that this constitutes a denial of due process of law in violation of the Fourteenth Amendment. Petitioner has had a full hearing on his sanity at the time of the offenses in question. Petitioner is asking that the Writ of Habeas Corpus or the Writ Coram Nobis become a means whereby an accused may

secure another trial every time he discovers additional evidence to augment his defense. There must be an end to litigation and the law does not allow the writs in question to be perverted into tools of delay in the administration of justice.

Habeas corpus may not be used instead of an appeal to review determinations of fact made upon conflicting evidence after a fair trial.

In re Chapman, 43 Cal. 2d 325, 390, 273 P. 2d 817.

"When a person is charged with crime by information or indictment, if the defense of insanity exists, it must be presented to the court having jurisdiction of the cause, and the decision of that court is final against any collateral attack. If an appeal is taken the appellate court may consider the question. Its decision thereon, when it becomes final, if it affirms the judgment, puts the case beyond further consideration by any court. So far as the legality of the sentence for the crime charged is concerned, *habeas corpus* does not lie unless the lack of jurisdiction appears on the face of the record of conviction. If it does not so appear the jurisdiction will be presumed. These propositions also apply to the question whether the court had authority to proceed with the trial of the criminal charge upon the claim that he was at that time of unsound mind. After the conviction and sentence have become final, the question of his insanity at the time of trial cannot be raised on *habeas corpus*."

In re Stevenson, 187 Cal. 773, 774, 204 P. 216,

"Upon habeas corpus, ordinarily it is not competent to retry issues of fact or the merits of a defense, such as insanity, and the sufficiency of the evidence to warrant the conviction of the petitioner is not a proper issue for consideration. (Citations.) Nor is habeas corpus an available remedy to review the rulings of the trial court with respect to the admission or exclusion of evidence, or to correct other errors of procedure occurring on the trial. (Citations.) Also, *newly discovered evidence does not justify relief* unless it is of such character as will completely undermine the entire structure of the case upon which the prosecution was based." (Emphasis added.)

In re Lindley, 29 Cal. 2d 709, 723, 177 P. 2d 918.

"Petitioner undoubtedly has established that at the trial there were disputed issues of fact and grave conflicts in the evidence. But the existence of such issues and conflicts at the trial, or *the discovery of new evidence pertinent to them, presents no ground for intervention by us on habeas corpus.* Even if petitioner's cause were presently before us on appeal from the judgments of conviction, the trial court's factual determinations, on such a record, would be conclusive. Under our system of law the weight of the evidence is primarily for the jury; it then may be reviewed by the trial judge and a new trial granted if in his discretion it appears that the weight of the evidence, despite substantial conflict, does not sustain the jury's finding. But on appeal, if there be substantial conflict, the determinations of the jury

> and trial judge must be accepted as final (citations) and on *habeas corpus*, wherein the attack is collateral, the sphere of inquiry and bases of action are still more limited (citations). If at the end of court procedures there is claimed to persist a miscarriage of justice, despite all the precautions of the law to the contrary, the ultimate remedy rests in an appeal to the governor for a pardon. (Citations.)" (Emphasis added.)
>
> *In re Horowitz*, 33 Cal. 2d 534, 546, 203 P. 2d 513.

Only where new evidence *dehors* the record established that the judgment was invalid has there been allowed an exception to the rule that the inquiry on habeas corpus is limited to an examination of facts appearing upon the face of the record and no evidence dehors the record has been received to impeach the judgment.

> *In re Carmen*, 48 Cal. 2d 851, 853-854, 313 P. 2d 817.

The purpose of the writ of coram nobis is to bring the attention of the court to, and obtain relief from, errors of fact, such as a valid defense existing in the facts of the case, but which, without negligence on the part of the defendant, was not made, either through duress or fraud or excusable mistake; these facts not appearing on the face of the record, and being such as, if known at the time of the trial, would have prevented the rendition and entry of the judgment questioned, but it is a general rule that the writ will not be granted for *newly discovered evidence going to the merits of the issues tried*; issues of fact, once adjudi-

cated, even though incorrectly, cannot be reopened except on motion for new trial and the writ does not lie to correct errors of law; it is not intended to authorize any court to review and revise its opinions.

People v. Tuthill, 32 Cal. 2d 819, 821-822, 198 P. 2d 505.

Even though the facts upon which the application for the writ is based were not discovered until too late to present them upon a motion for a new trial newly discovered evidence is not a basis for *coram nobis*.

Suebold v. People, 191 A. C. A. 536, 12 Cal. 827.

The defense of insanity at the time of the offense and the case of newly discovered evidence must be made at the trial or by motion for a new trial and cannot be made the grounds of an application for the writ coram nobis.

People v. Reid, 195 Cal. 249, 256, 232 P. 2d 457, 36 A. L. R. 1435;

People v. Cabrera, 7 Cal. 2d 11, 13, 59 P. 2d 804.

In the case of *Eagles v. United States*, 329 U. S. 304, 311-312, 67 S. Ct. 313, 91 L. Ed. 308, the function of the writ of habeas corpus was described in this language:

"It is elementary that habeas corpus may not be used as a writ of error. (Citations.) The function of habeas corpus is exhausted when it is ascertained that the agency under whose order the petitioner is being held had jurisdiction to act. If the writ is to issue, mere error in the proceed-

ing which resulted in the detention is not sufficient. (Citations.) Deprivation of petitioner of basic and fundamental procedural safeguards, an assertion of power to act beyond the authority granted the agency, and action without evidence to support its order, are familiar examples of the showing which is necessary. (Citations.) But it is not enough to show that the decision was wrong, (Citations), or that incompetent evidence was admitted and considered. (Citations.) If it cannot be said that there were procedural irregularities of such a nature or magnitude as to render the hearing unfair, (Citation), or that there was no evidence to support the order, (Citation), the inquiry is at an end."

In the case of *United States v. Baldi*, 344 U. S. 561, 569-570, 73 S. Ct. 391, 97 L. Ed. 549, this Honorable Court had under consideration a question bearing a close resemblance to the instant one. In that case petitioner had been sentenced to death on a plea of guilty to first degree murder and at the hearing in regard to penalty the defense introduced evidence to establish that petitioner was insane. The sentencing court was not satisfied by the evidence that petitioner had been insane either at the time of the murder or at any time thereafter. After the State Supreme Court affirmed the conviction petitioner sought on habeas corpus to have the United States District Court order a hearing on the issue of his sanity. After dismissal of the petition this Honorable Court granted certiorari and said:

"Petitioner's final point is that the United States District Court committed error in refusing

to hold a plenary hearing for determination of his sanity. This is refuted by Brown v. Allen, 344 U. S. 443, at 490-493, 97 L. Ed. 469, 73 S. Ct. 397, decided today.

"In denying the first petition, the District Court received evidence from judges of the State trial panel, defense and prosecution counsel and others as to whether a fair hearing on petitioner's sanity had been accorded him by the State. In denying the second petition for habeas corpus, the District Court held that not 'unless special circumstances prevail, should the lowest federal court reverse the highest state court in cases where the constitutional issues have been disposed on the merits by the highest state court in an opinion specifically setting forth its reasons that there has been no denial of due process of law, and where the record before the state court and the allegations in the petition for the writ before the federal court fail to disclose that the state in its prosecution departed from the constitutional requirements. That is this case.' (Citation.)

"This view of the proceedings accords with our holding in the Brown Case (U.S.) supra. As the trial and appellate State court records which were before the District Court show a judicial hearing, where on the plea of guilty the question of sanity at the time of the commission of the crime was canvassed, the sentence does not violate due process."

So, in the instant case, the Supreme Court of California had reviewed the conviction of petitioner and was judicially aware that he had received a fair hear-

ing on the issue of his sanity at the time of the commission of the three offenses. Thus it cannot be correct that the court erred in refusing to reopen the issue and have another trial for the issue had already been fairly and finally determined.

In light of the foregoing decisions it is abundantly clear that the Supreme Court of California acted entirely consistent with the law and properly refused to grant petitioner's request for a Writ of Habeas Corpus or Coram Nobis leaving him to seek his remedy in the pardoning and clemency power of the governor.

III.

The Taking of Blood and Saliva Specimens to Be Used Against Petitioner Did Not Deny Him Due Process of Law.

Finally, it is contended by appellant that the taking of blood and saliva samples from him was in violation of his rights under the Fourth and Fifth Amendments of the United States Constitution, Article I, Section 19, of the California Constitution as an unreasonable search and seizure and a cruel act upon his body as condemned by *Rochin v. California*, 342 U. S. 165, 96 L. Ed. 183, 72 S. Ct. 205, 25 A. L. R. 2d 1396. Respondent submits the taking of the blood and saliva specimens was lawful and proper under the circumstances of the case.

The record is silent as to the manner in which the saliva specimen was obtained but it appears to respondent that it would not require a severe violation of the person in order to secure such a specimen. In any case there was no objection as to the taking of that specimen. As to the blood specimen the record indi-

cates that appellant was taken to the Central Receiving Hospital where he sat down at a table, a nurse put a rubber tube around his arm, inserted a hypodermic needle attached to a syringe, and withdrew some of the blood, transferred that blood to a vial and turned it over to Sergeant McCaulley and Ray H. Pinker, forensic chemist. Appellant did not pull away from the needle nor object in any manner. [Rep. Tr. pp. 873-874.] Counsel for appellant objected that there was no foundation that appellant consented to the taking or that he was capable of consenting to the taking. [Rep. Tr. p. 875.]

While there is no evidence of affirmative consent, appellant appeared to acquiesce in the taking and no force was evident.

In the case of *Breithaupt v. Abram*, 352 U. S. 432, 436-437, 77 S. Ct. 408, 1 L. Ed. 2d 448, this Honorable Court had occasion to consider the contention that the taking of a sample of body fluid (blood) for use in evidence against an accused offends that "sense of justice" spoken of in *Rochin v. California*, 342 U. S. 165, 96 L. Ed. 183, 72 S. Ct. 205, 25 A. L. R. 2d 1396 (1952) and concluded as follows:

> "We therefore conclude that a blood test taken by a skilled technician is not such 'conduct that shocks the conscience,' Rochin, supra (342 U. S. at 172), nor such a method of obtaining evidence that it offends a 'sense of justice'. . . ."

In California it was settled in the case of *People v. Haeussler*, 41 Cal. 2d 252, 257, 260 P. 2d 8, cert. den. 347 U. S. 931, 74 S. Ct. 533, 98 L. Ed. 1082, that the admission of evidence of blood taken without the con-

sent of the defendant did not violate his privilege against self-incrimination since that privilege is a testimonial one (*Holt v. United States*, 218 U. S. 245, 31 S. Ct. 2, 54 L. Ed. 1021). Also settled in California by this case was the rule that the taking of blood in a medically approved manner for a test did not constitute brutality or shock the conscience and that, therefore, the defendant had not been denied due process of law under the in *Rochin v. California*, *supra* (342 U. S. 165).

The remaining question as to unreasonable search and seizur has been settled in California by the case of *People v. Duroncelay*, 48 Cal. 2d 766, 770-772, 312 P. 2d 690 where it was held that if reasonable cause to believe the defendant has committed a felony exists a reasonable search is warranted and the scientific reliability of blood tests renders the taking of blood no different from the seizure of evidence of any character.

In the *Duroncelay* case, *supra* (48 Cal. 2d 766), the accuracy of the blood test was not questioned. In the instant case the accuracy of the test involved was questioned at the trial level only to the extent that no such test can establish identity between a specimen of semen and a person; however, there was no question of the accuracy of the test concerning the purpose for which it was designed namely, to establish the blood group of the person emitting the specimen. Our courts have accepted evidence of blood type. No question has been raised in this appeal as to the admissibility of the results of the semen blood comparison and we submit that the taking of a sample for such a test without consent cannot be regarded as an unreasonable search and seizure where, as here, the extraction is made in

a medically approved manner and is incident to the lawful arrest of one who is reasonably believed to have committed murder.

Conclusion.

This concludes the opposition of respondent to the Petition in the instant case. It is submitted that when the claims of petitioner are examined it will affirmatively appear that no rights guaranteed by him by the Constitution of the United States were violated and that the judgment of the California Supreme Court should stand. It is respectfully requested that the Petition be denied.

Respectfully submitted,

STANLEY MOSK,
Attorney General,

WILLIAM E. JAMES,
Assistant Attorney General,

PHILIP C. GRIFFIN,
Deputy Attorney General,

Attorneys for Respondent.

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IN THE

Supreme Court of the United States

October Term, 1961

No. 361

DARRYL THOMAS KEMP,
Petitioner,
vs.
STATE OF CALIFORNIA.

SUPPLEMENTAL BRIEF

RUSSELL E. PARSONS,
448 South Hill Street
Los Angeles 13, California
Attorney for Petitioner,
Darryl Thomas Kemp.

DANIEL N. BUSBY,
HARRY E. WEISS,
Of Counsel.

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SUPPLEMENTAL BRIEF

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

COMES NOW your petitioner, DARRYL THOMAS KEMP, and respectfully asks the Court for permission to file this Supplemental Brief by reason of the fact that, since the filing of the Petition for Writ of Certiorari, matters have occurred which should be brought to the attention of this Court.

I.

THE PETITIONER IS NOW INSANE AND HAS BEEN FOR A SUBSTANTIAL PERIOD OF YEARS, AND WE CONTEND WAS AT THE TIME OF THE TRIAL AND CONVICTION HEREIN.

In the Petition for Certiorari we made the following representation to this Court:

The Supreme Court erred in holding that the evidence was sufficient, and in particular in denying to this petitioner a hearing as prayed for in the Writ of Habeas Corpus, or, in the alternative, for a Writ of Error Coram Nobis, or for a Rehearing.

The Petition for Writ of Habeas Corpus, or, in the alternative, Error Coram Nobis, was filed July 28, 1961, before the Supreme Court of the State of California, in that court's Criminal No. 6946, and was denied August 9, 1961. A copy of the petition is before this Court and is contained in the supplemental record recently forwarded to this Court, to which we respectfully direct the Court's attention.

It will be borne in mind that this petitioner asked this Court for an extension of time within which to file a Petition for Certiorari and for a Stay of Execution. This Court granted both petitions, and at that time the State of California opposed the granting thereof and, in effect, contended that the petitioner Kemp was sane enough to be executed. However, on the eve of his execution, and as one might well say, in "the nick of

time," this Court granted a stay, and suddenly the Warden of San Quentin Prison was confronted with medical testimony which establishes without any reasonable basis for dispute now that this man has not been competent for some time to form an intent. Dr. David G. Schmidt, Chief Psychiatrist at the California State Prison, at San Quentin, made a report to the effect that recent "EEG brain wave studies support the clinical manifestations that this man had not been and is not fully responsible."

In our Petition for Writ of Certiorari we further called the Court's attention to the neuropsychiatric summary, dated June 16, 1961, by Knute Hoegh Houck, M.D., Chief Psychiatrist, California Medical Facility.

We also called the Court's attention to the report of David G. Schmidt, M.D., Chief Psychiatrist at the California State Prison, at San Quentin, to F. R. Dickson, Warden, which indicated positively that the four series of EEGs have been considered in conference by the doctors and that there are abnormal findings which did not show up in the two series of EEGs run at the time of Kemp's trial.

II.

ON JUNE 20, 1961, PURSUANT TO SECTION 3701[1] OF THE PENAL CODE OF CALIFORNIA, THE HONORABLE ROGER P. GARETY FILED A PETITION IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF MARIN, TO INQUIRE INTO THE SANITY OF DARRYL THOMAS KEMP.

Thereafter, pursuant to said petition by the said District Attorney for the County of Marin, State of California, the Superior Court of that County made an order, in proceedings No. 34355, fixing the date for hearing, under Section 3701, by the Superior Court, and thereafter the matter came on to be heard and was tried by the Court sitting with a jury.

On September 19, 20 and 21, 1961, the matter was tried by the said Court sitting with a jury, at which time evidence was offered upon the question as to whether or not the said Darryl Thomas Kemp was then insane. Psychiatrists were called and testified and, after hearing the evidence, the arguments of counsel and the instructions of the Court, the inquiry was sub-

---

[1]Section 3701. (SANITY INVESTIGATION; FILING OF PETITION, AVERMENTS, SUMMONING AND IMPANELING OF JURY.) If, after his delivery to the warden for execution, there is good reason to believe that a defendant, under judgment of death, has become insane, the warden must call such fact to the attention of the district attorney of the county in which the prison is situated, whose duty it is to immediately file in the superior court of such county a petition, stating the conviction and judgment, and the fact that the defendant is believed to be insane, and asking that the question of his insanity be inquired into. Thereupon the court must at once cause to be summoned and impaneled, from the regular jury list of the county, a jury of 12 persons to hear such inquiry.

mittted to the jury. The jury retired for deliberation, returned into Court, and rendered its verdict that Darryl Thomas Kemp "is insane."

Thereafter, the Judge of the said Superior Court rendered its judgment of insanity and order of commitment as follows:

> "IT IS HEREBY ORDERED, ADJUDGED AND DECREED:
>
> "1. That DARRYL THOMAS KEMP is insane.
>
> "2. That DARRYL THOMAS KEMP be, and he is hereby committed to the Department of Mental Hygiene for placement in a State Hospital, to wit, Atascadero.
>
> "3. That the Warden of the State Prison at San Quentin, California, forthwith take, convey and deliver DARRYL THOMAS KEMP to the Medical Superintendent of the hospital designated herein together with a certified copy of this order, and there he is to be kept in safe confinement until his reason is restored."

There has been filed with the Clerk of this Court a certified copy of the said judgment of insanity and order of commitment in the matter of Darryl Thomas Kemp, in the Superior Court of the State of California, in and for the County of Marin, bearing its number 34355.

It is our contention that this is substantial evidence, in addition to the testimony of the doctors, which es-

tablishes, we earnestly contend, that this man was and is insane; that he could not have formed an intent to commit the crimes with which he stands convicted.

III.

THE TAKING OF BLOOD SAMPLES AND SECRETIONS FROM KEMP AND THE USE IN THE TRIAL OF THE TESTIMONY OF OFFICER PINKER WITH REFERENCE TO THE RESULTS OF SUCH TESTS AMOUNTS TO AN UNLAWFUL SEARCH AND SEIZURE. IT WAS AN ACT IN VIOLATION OF THE PRIVACY OF THE DEFENDANT AND CONSTITUTED VIOLATIONS OF THE FOURTH AND FIFTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES, AND, IN FACT, ARTICLE I, SECTION 19, OF THE CONSTITUTION OF THE STATE OF CALIFORNIA.

In the Petition for Writ of Certiorari, we made the foregoing contention and set forth that evidence to the prejudice of the defendant-petitioner was offered concerning the blood group of the victim and of Kemp. Certain secretions were taken from Kemp, including his blood, as called to this Court's attention, on pages 25 and 26 of the Petition for Writ of Certiorari, and as appears in the record on file herein, Reporter's Transcript, pp. 872-874.

It is our contention that these samples were not voluntarily given by the petitioner Kemp. The respondent, State of California, asserts (Brief for Respondent in Opposition, p. 26):

> "While there is no evidence of affirmative consent, appellant appeared to acquiesce in the taking and no force was evident."

How can it be contended that a man who is insane could possibly acquiesce to the taking of samples of blood to be used against him? This is a plain denial of due process of law. We contend it offends that "sense of justice" spoken of in *Rochin v. California*, 342 U.S. 165, 96 L. Ed. 183.

The case of *Breithaupt v. Abram*, 352 U.S. 432, 1 L. Ed. 2d 448, we respectfully urge, is not authority for the taking of blood under the circumstances of this case. The *Breithaupt* case was one of the "highway" cases where the right to use a highway subjects one to various tests, and the reasoning is that if one has the privilege of driving on the highway, he is subject to whatever tests, chemical or otherwise, that might be required of him. But even in the *Breithaupt* case it is said:

> "This is not to say that the indiscriminate taking of blood under different conditions or by those not competent to do so may not amount to such 'brutality' as would come under the *Rochin* rule."

However, Mr. Chief Justice Warren, speaking for the dissenters, said:

> "The judgment in this case should be reversed if *Rochin v. California*, 342 U.S. 165, 96 L. Ed.

183, is to retain its vitality and stand as more than an instance of personal revulsion against particular police methods."

None of the cases cited, such as *People v. Haussler*, 41 Cal. 2d 252, 260 Pac. 2d 8, approved the taking of a blood sample from a man who is incompetent or insane. Truly, if this does not shock the conscience, what does?

CONCLUSION

WHEREFORE, petitioner respectfully prays that the Writ be granted.

Respectfully submitted.

RUSSELL E. PARSONS,
Attorney for Petitioner.

DANIEL N. BUSBY,
HARRY E. WEISS,
Of Counsel.